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ALEXANDER L. STEVAS,
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No. 80-2121

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

Edward Dean Martin,

Petitioner

v.

The State of Georgia,

Respondent

Reply Brief

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COMES NOW, Edward Dean Martin, who is the petitioner in the above styled action, and files this his reply brief to respondent's brief in opposition for the respondent and respectfully shows to this honorable court the following, to-wit:

I.

FACTUAL ISSUE

A. Should petitioner have been permitted to test the subject items of physical evidence below?

II.

LEGAL ISSUE

A. What is critical evidence?

III.

LAW INVOLVED

A. "Critical evidence" is material evidence of substantial probative force that "could induce a reasonable doubt in

in the minds of enough jurors to avoid a conviction. Gray v. Rowley, 604 F. 2d. 382 (1979).

B. " No conviction shall be had for rape on the unsupported testimony of the female." Ga. Code Ann. 26-2001.

IV.

LAW APPLIED TO FACTS

In this case, petitioners entire defense was based upon the contention that no rape had occurred.

Prior to trial defendant secured from the State a list of all witnesses. The only examining physician was Dr. Victor Bautista. The microanalyst expert was Roger Paian.

Petitioner demanded a preliminary hearing on the charges of rape and aggravated assault. Petitioner subpoenaed Dr. Victor Bautista to testify at this

hearing. Under oath, at the preliminary hearing, Dr. Bautista testified that he did a general physical examination and "the only positive findings that I saw was that there was a swelling of the right index finger and she was very nervous at the time" (p. 92 preliminary hearing transcript). The doctor testified that he did not have any physical finding indicating recent intercourse, that he didn't note any physical injury to her face, that he didn't see any grease or grass on her face, that he did a careful examination and usually would have noted any such finding since he knew this would be evidence in a rape case. (P. 92-97 preliminary hearing transcript).

Upon the trial three weeks later and upon the retrial eighteen months later,

Dr. Bautista testified that he did find evidence of intercourse because there was a discharge and that discharge was, most probably, a sign of intercourse if it is positive for sperms.(T-181). (Before trial someone apparently advised the doctor of the testimony expected from the crime lab microanalyst).

The doctor further testified that if the discharge is positive for sperms, then it is a sign that it is penetration. (T-182).

The doctor also added to his testimony, contrary to his previous sworn testimony, that he actually found a discharge and that she had a bruised or hurt lip. (T-177, T-179, T-181, & T-182).

The defendant contended that whole sperm could be found 6 to 14 days after

intercourse. When defendant sought to inquire of the doctor, the respondent objected and the court directed that the doctor would have to be qualified " as to his expertise in that particular area." (T-188).

The respondent, through their expert witness, Roger Parian of the State crime lab, then testified that in his opinion intact sperm could not be located more than 14 hours after intercourse, and he further testified that he did find an intact sperm on the slide he prepared. (T-200, T-202-3).

The respondent's expert witness acknowledged that other experts may have a different opinion or may use a different techique in arriving at their opinions as to the age of an intact sperm and he was aware of the conflicting research

and publications finding intact sperm several days after an alleged incident. (T-203-4).

The petitioner was then effectively boxed in by the respondent's expert whose opinion of the age of the sperm he found was 14 hours or less because the evidence showed that the alleged victim and her husband had separated more than 14 hours before the alleged incident.

The petitioner was unable to then produce any witness to counter the respondent's evidence.

The petitioner then attempted to counter this evidence by asking that a comparison be made between the alleged sperm (serum) held by the respondent and his serum since such tests are scientifically recognized and could exclude him as

the person who deposited the sperm. (T-206-207).

In this case where the alleged victim changed her testimony under oath on many material points, where the doctor directly reversed his opinion on the crucial testimony as to whether or not a rape had ever occurred, where the state's expert sets up his own time frame contrary to known research, where there was no evidence of fibers between the clothes of the victim and the defendant, where there was no hairs of the petitioner exchanged with the alleged victim, where the testimony is one on one victim v. defendant and where the jury chose to disbelieve the victim on the charge of aggravated assault arising at the same time and found defendant not guilty on the aggravated assault charge, can anyone imagine more

critical evidence " than 14 hours old sperm".

Could anyone imagine evidence more critical than being able to prove by another expert a longer time frame if justified by the condition of the sperm found.

Could anyone imagine more critical evidence than being able to prove by expert testimony that the sperm relied upon was excluded as defendant's serum or sperm.

The evidence clearly shows that opinions, methods, and technique of experts may vary. (T-203-205).

The grease was treated in the same way.

In his concluding argument to the jury the respondent below argued in part as follows, to-wit:

" First of all is rape and there is certain things that the state must prove as to the rape. First of there must be carnal knowledge, that's intercourse penetration. The evidence is clear there has been intercourse because intact sperm were found in the vagina of the victim which indicated there was sexual intercourse and there was penetration ." (T-346).

" Grease. No grease. No grease? You look at these and tell me there's no grease. There's dirt and grease all over these. That's grease. That's dirt. She didn't get that from dancing. She got that from what happened to her out there at the scene. There's your evidence of dirt and grease." (T-350).

" The presence of sperm proved intercourse is corroboration under Georgia law and that's been shown and that's corroboration." (T-352).

" One intact sperm is found on the slides, they test no further because they have found intercourse and thats the object of the test." (T-354).

In this case we have the respondent holding all of the alleged evidence from the victim and the crime scene.

The evidence is certaintly critical and is subject to varying expert opinions.

Most important the respondent not only refuses to allow petitioner to test, they themselves refuse to compare the grease and sperm or serum by their own experts.

It is submitted that the aforesaid law when combined with the testimony of experts and the concluding remarks of re-

spondent below show conclusively that the trial below amounted to much more than a credibility test between the alleged victim and petitioner as respondent would have this court believe. In fact, as will be shown upon brief, if permitted, respondent's presentation of the necessary corroborative evidence to obtain a conviction below rested entirely upon the identical items of physical evidence that petitioner sought to examine, verify, and test below.

The defendant's basic Constitutional rights to a fair trial, due process, and equal protection, have been grossly violated and if relief is not granted, this defendant, and countless others, will spend the balance of their lifetimes in confinement because of the right of the

respondent to withold critical evidence.

V.

CONCLUSION

Under the circumstances of the matter at bar, the subject physical items that petitioner sought to examine, verify, and test below did in fact constitute critical evidence.

WHEREFORE, PREMISES CONSIDERED, Petitioner again respectively prays that this honorable court issue a writ of certiorari to the court of appeals for the State of Georgia to review this cause for the reasons stated above, and that this court reverse petitioner's conviction.

Respectively submitted,

John R. Woodward, III.
Counsel of Record

Richard D. Phillips
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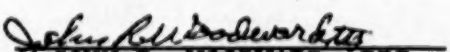
CERTIFICATE OF SERVICE

I John R. Woodward, a member of the bar of this court and counsel of record for petitioner, hereby certify that on this the 31st day of July, 1981, I served three copies of the foregoing Reply Brief upon the Honorable Michael Bowers, Attorney General, by mailing the same to him via United States mail, first class postage prepaid, form Ludowici, Georgia, addressed to him at 132 State Judicial Building, Atlanta, Georgia. 30334.



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